recent graduate of Princeton University. He studied law in Washington, although he has forsaken the capital city to practice law in New York, and is well known to most of you here. I believe, leaving out an occasional appearance in court, this is Mr. Dulles' first formal appearance upon the lecture platform.

HAS THE UNITED STATES THE RIGHT TO EXCLUDE FROM THE USE OF THE CANAL ANY CLASS OF FOREIGN VESSELS. SUCH AS RAILWAY-OWNED VESSELS?

ADDRESS OF MR. JOHN FOSTER DULLES, *of the New York Bar.*

If the United States is entitled to exercise sole and exclusive sovereignty over the Panama Canal, there can be no question that she may arbitrarily exclude from the canal whomsoever she will. Sovereignty necessarily implies such a right of exclusion, and, though a sovereign state frequently, by treaty, stipulates not to exercise this right in respect of the subjects of a foreign state, the right no less exists though held in abeyance.

On the other hand, if the United States exercises less than sovereign rights over the Panama Canal, the right to exclude may be qualfied, or even non-existent.

It therefore becomes necessary to consider the international status of the canal and to determine whether or not the United States is entitled to exercise all the rights of sovereignty thereover; and, if not, the extent to which any qualification of sovereignty may correspondingly qualify the right to exclude.

I shall not here consider whether or not the United States has, by any treaty, agreed not to exercise the right of exclusion as regards the nationals of any one nation, but rather the more fundamental question of whether the United States has acquired or can acquire such a proprietary interest in the Panama Canal as implies this right of arbitrary exclusion.

I ask you, in the first place, to consider the international status of the Panama Canal as affected by its physical nature and geographic location.

The very obvious fact that the canal is a waterway is of prime importance from the international view point. It is settled beyond dispute that sovereign rights can be acquired over land much more readily than over water, and it is the exception rather than the rule when

one nation is entitled to exercise the rights of exclusive sovereignty over navigable water.

This differentiation of land and water as spheres for the exercise of sovereignty is practical rather than theoretical. It is not that navigable water may not be susceptible of subjection to the exclusive domination of one nation, but that the practical consequences of permitting this are abhorrent to the civilized world. Freedom of commerce and communication is vital to the prosperity of all nations; navigable water is the ideal medium for international communication, in that it covers a great portion of the globe, is not exhausted by use, and, generally speaking, is of no intrinsic value. In view of such considerations as these, there has been a well-defined tendency to circumscribe the right of one nation to acquire over navigable water an exclusive sovereignty from which it could derive no positive advantage but only such negative benefit as might indirectly result from crippling the commerce of other nations by depriving them of free access to such water. Admit the general principle that navigable water may be subject to exclusive sovereignty and it will follow that every nation would ultimately become an "inland" nation with all the economic paralyzation that such a condition involves. Vital, living needs have prevailed, and today we see established the general principle that *navigable* waters are in times of peace *international* waters and not subject to exclusive national control. This rule is subject to the qualification that where a body of navigable water is reasonably useful for commerce with but one or a limited number of states, such state or states may exercise exclusive sovereignty thereover. This for the reason that, as no nation need be traded with against its will, any nation can always control the utility of water admittedly useful for commerce with it alone. With this reservation, I believe it can be stated generally that all navigable water is, in times of peace, open to the innocent commerce of the world.

Whether or not this proposition, so broadly stated, finds acceptance, the narrower proposition that navigable water connecting two open bodies of water must itself be open, is well established. The United States is thoroughly committed to this proposition which it has enunciated and urged on numerous occasions, as, for instance, in negotiation respecting the Danish Sound and the Straits of Magellan.

The Panama Canal falls clearly under this rule. It is—*par excellence*—a waterway connecting two open seas. If in the past the

economic needs and practical necessities of the world's commerce have demanded and obtained the internationalization of the Rhine, the Danube, Danish Sound and Straits of Magellan, in spite of the opposition of states claiming exclusive sovereignty thereover, surely a strong case must be made to withdraw from the operation of the rule there applied, the Panama Canal, which far transcends them all in its importance to the world's commerce.

It cannot be questioned that were the Panama Canal a *natural* waterway, it would be a waterway open on equal terms to the world's innocent commerce. Is, then, the fact that the Panama Canal is an *artificial* waterway sufficient to give it a different international status from that which it would assume were it a natural waterway?

It is urged with great force that a canal constructed by American genius, with American money, traversing soil acquired by the United States must, *ipso facto,* be an exclusively national waterway. This argument leads me to consider for a moment a sphere of common law where a similar argument is raised with almost monotonous frequency. It is a well-settled principle of common law that where an individual devotes his property, time, money and enterprise to the construction of a work in which the public has a vital interest, the public acquires an interest therein and the work is said to be *affected with a public use.*

We have long been familiar with the application of this doctrine to railways, canals, hotels, etc., and modern economic developments have led to its extension to enterprises of a less obviously public nature, as stock-yards, dry docks, stock exchanges, grain elevators.

It has been insisted with the greatest vigor that this doctrine does violence to property rights, that works constructed by private genius, upon private property with private funds, must belong exclusively to the individual proprietor. But the courts have said: private property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. What matters it that an enterprise represents private investment and is directed by private genius? The proprietors have seen fit to devote themselves and their money to the construction of a work in which the public is vitally interested. They need not have done so. But having done so, arguments based on private property rights will not be allowed to prevail against the practical necessity of according the public certain rights therein.

In suggesting this common law analogy I do not mean that we should, in the domain of international law, adhere blindly to common law principles in determining *what* shall be deemed to be clothed with an international use. I do say, however, that when international law, following its own guiding principles, has determined that a given waterway should be affected with an international use, that then, as in common law, arguments based on the fact of national construction and ownership should not be allowed to prevail against the practical application of the principle.

Nor have such considerations prevailed. Rivers like the Rhone, Elbe and Danube have been impressed with international character despite the fact that, in portions of their length, they flow through the territory of but one nation. Narrow straits like the Danish Sound have been declared free and open to the world's commerce, though such straits may have been rendered available for commerce only by virtue of expenditure for lights, buoys, etc., made by the proprietary nation. Such instances as these show that when international law applying its own tests decides that national property should be affected with an international use, then practical application of this principle is made inexorably, and claims of national property rights, though theoretically sound, give way before it.

What then are the tests which international law proposes for determining the status of that portion of the earth's surface which here concerns us?

I have already indicated the formulation of the general principle that all navigable water is, *prima facie,* in time of peace, affected with an international use. And as this principle has developed as the expression of the practical needs and necessities of national life, it is natural that the rigor of its application has varied with the necessities of the case, thus leading to the formulation of narrower, derivative rules framed to meet conditions of unusually acute necessity, which fact accords them more unqualified recognition than the general principle itself. Such a rule is that already referred to, that a waterway connecting open seas must itself be open. This rule, framed as it was to respond to the more special instance of acute necessity on the part of the world's commerce, could hardly have contemplated a situation when its application is as urgent as in the case of the Panama Canal.

Thus international law, following its own guiding principles, apply-

ing its own tests, leads to the conclusion that the Panama Canal as a waterway connecting the Atlantic and Pacific Oceans is affected with an international use.

I desire to draw your attention to one or two other considerations which serve very strongly to reinforce this conclusion.

The circumstances attending the acquisition by the United States of the canal territory are fresh in the minds of all of us. Reduced to essentials, and stripped of pretense, is it not a fact that the United States acquired a portion of the territory of Colombia against her will, for the purpose of the construction of an interoceanic ship canal?

Let me again refer to a common law analogy which appears to me to be significant: An individual owns a plot of land indispensable for the construction of a railway. The company can not induce the proprietor to grant the right of way over his territory for a reasonable compensation. The railway company thereupon, *by condemnation proceedings,* takes the right of way from the proprietor against his will. But the private property thus taken from the owner against his will *must be devoted to a public use.* Upon this we insist unreservedly. Such a provision is incorporated in the Constitution of the United States and in the constitutions of most of our States. And whenever a State constitution has failed to contain such a provision, the courts have with unanimity held that a principle of such elementary justice must be assumed as underlying our theory of government and system of law.

Shall, then, the United States, in its dealings with foreign nations, abandon this principle? If elementary justice, as between citizen and citizen, and between government and citizen, demands that when property is taken against the individual owner's will the property must be devoted to a public use, can we deny that when as a nation we in time of peace take the property of another nation against its will, that such property must be devoted to an international use? We are not here dealing with a technical rule of common law, but with a broad principle of justice recognized as a basic principle of just and honest dealing.

I believe it a sound principle of international law, as of common law, that the territorial rights of no one nation should be allowed to interfere with the construction of a waterway of tremendous moment to the whole world. But when a nation, claiming, as the United States claimed, to be acting by virtue of such a principle, deprives another

nation of its territory against its will, it is absolutely essential that the property thus taken be devoted to an international use.

I desire to call your attention to yet another principle, namely, that of dedication to a public use. The essentials of such dedication are:

1. That a proprietor indicate by words or acts, as fully as the subject-matter will permit of, an intent to devote a portion of his property to a designated public use.

2. That the public accepts the dedication thus offered.

Applying these principles to the Panama Canal, there can be no question but what the United States has indicated its intent to dedicate the canal as an international highway for the use of the commerce of the entire world. For about seventy-five years we have consistently declared, reiterated and emphasized such a purpose. I believe that we have indicated our intent to devote the canal to an international use as fully and as completely as the subject-matter has permitted of.

That is, we have done this prior to the passage of the Panama Canal Act. Here for the first time we see indications of an intent to utilize the canal for purely national ends, as a means to benefit American commerce and to impose upon the world purely American policies. In the Panama Canal Act the United States evinces a desire to revoke its offer to dedicate the canal to an international use. But, could the offer be revoked? Could the dedication be denied?

Once an offer to dedicate is accepted, it cannot be revoked. And such acceptance need not be formal action. It is enough if other nations, relying on the offer to dedicate, change their positions so that, were the offer not carried out, they would suffer loss. The dedicator thereupon becomes estopped from withdrawing his offer. Such acceptance by estoppel is not unusual. In the very nature of the case it frequently occurs that an offer to dedicate is made to a portion of the public which has no properly constituted representative to make a formal acceptance. But individual members of the public, by acting in reliance on the offer, effectually accept it by estopping the offeror from withdrawing his offer.

And so it has been with the Panama Canal. For decades the United States has been holding out to the world its intent to dedicate the canal to an international use. And what nation of the world has not in some way acted or refrained from acting in reliance thereon? Not only have vast sums of money been expended, but treaty rights have

been waived, national policies have been abandoned and new ones adopted in reliance on the declared intent of the United States to dedicate the canal to the world's commerce.

How can we today revoke our promise, declare null and void our dedication? It is impossible. The reliance of the whole world upon our promise has estopped us from withdrawing it. Our offer has been accepted; our dedication is complete.

And what is the significance of our conclusion that the Panama Canal is affected with an international use? When I say that the Panama Canal is affected with an international use, I mean substantially what we mean when we say that private property, such as a railway, is affected with a public use. The proprietor continues to hold title to his property, he is entitled to impose tolls so as to secure a reasonable return upon his investment, he may make reasonable rules looking toward the safe-guarding, preservation and maintenance of his property, but upon him is imposed the positive duty of serving the entire public without discrimination. The correlative right to be so served is accorded the entire public.

And so it is with the Panama Canal. We make rules necessary properly to safeguard and police the canal. We may impose tolls to an extent necessary to secure a reasonable return on our investment. But on what theory can we exclude any class of foreign vessels such as railroad-owned vessels?

Such an exclusion cannot be justified as a refusal to serve competitors, as it applies to all railways and not merely to the few who may be in actual competition with the canal. In any case, it is well established that where property is affected with a public use, no discrimination can be made even against a competitor. I believe this is a sound rule and one equally applicable to property affected with an international use.

But an exclusion of *all* railway-owned vessels can only be explained as expressing a general public policy opposing railway control of water transportation.

What application has such a policy to the Panama Canal, which is neither a vessel nor a railway nor affected by the ownership of any vessel? Obviously none. To exclude railway-owned vessels from the canal is not to legislate *as to the canal,* but it is an attempt to use the canal as an instrument to legislate as to *foreign* vessels and *foreign* railways, not properly amenable to our laws. It is leg-

islation by indirection similar to the suggested method of compelling stock exchanges to become incorporated by depriving unincorporated exchanges of the use of the mails.

Such legislation, which seeks by indirect means to accomplish what could not be done directly, is only justifiable, if at all, when the legislator has such peculiarly exclusive and absolute control of the instrument he uses that the use to which he puts it cannot be questioned even by those injuriously affected thereby. To use the canal as a club, to impose American policies on the world, implies greater rights therein than would flow from the mere right to legislate as to matters really affecting the canal itself. We have seen that even this latter right does not inhere unqualifiedly in the United States. How much less the right to use the canal as a means for legislating as to foreign vessels and foreign railways!

It is of the essence that an international canal be free from the operation of such national policies.

If it means anything that the canal is affected with an international use, it means that the canal is open to all without discrimination; no class of foreign vessels can be excluded.

The CHAIRMAN. The subject is open for discussion.

Mr. CHARLES G. FENWICK. Mr. Chairman, I gather from the address of Mr. Dulles that he bases his contention that foreign railway-owned vessels could not be excluded from the canal on the general principles of international law rather than on any particular clause of the Hay-Pauncefote Treaty.

Rule 1 of Article IV of the treaty says that no discrimination shall be made in respect of conditions of traffic, and as far as discrimination goes it would seem that the treaty is not violated if foreign railway-owned vessels are excluded from the use of the canal together with American railway-owned vessels. But apart from the treaty, there are the general principles of international law, which forbid one who is in the position of a common carrier from imposing unfair restrictions upon the traffic handled by him. While this development of international law by analogy with the common law of Great Britain and the United States is very instructive, it seems to me that the first clause of Rule 1, that the canal shall be "open and free" to the vessels of all nations, contains a clear prohibition against the imposition

of any restriction not connected with the proper administration of the canal itself.

I want to pass from that to a further point. It seems to me, from the papers that have been presented by Mr. Johnson and Mr. Harris, that all the wind is taken out of the sails of the British protest. If, after all, the sum of $1.20 per ton, which is to be the charge for vessels passing through the canal, is actually lower than what the United States could fairly charge in order to bring the returns up to the interest on the capital invested plus the cost of maintenance, it would seem that the exemption of American coastwise shipping will not result in imposing upon British vessels a heavier toll than they might fairly be charged.

What room can there be for protest from foreign countries, if they are actually charged less than they might fairly be charged? We have listened this afternoon to interesting papers showing unquestionably, as I think, that the United States may grant a subsidy to its own vessels. If the United States grants a subsidy in the indirect form of an exemption from tolls and that subsidy works no injury to foreign vessels which, even if the United States coastwise vessels were not exempted, might fairly be charged more than $1.20 per ton, then it seems to me that there is little left of the British protest as far as practical results go.

But while the power conferred upon the President by Congress has not actually been exercised in a way to injure British shipping, it nevertheless remains true that the President has it in his power to fix, from time to time, such tolls as would amount to a denial to British shipping of equality of treatment. The fact that no injury has actually been inflicted does not satisfy the British Government that its shipping is secure against injury in the future. You remember that in the Northern Securities case, the Supreme Court of the United States decided that a company not otherwise subject to legislation on the part of Congress came within the provisions of the Anti-Trust Act because the company had it in its power to restrict commerce, if at any time it should seek to do so. Applying the same principle to the case before us, we must admit that there is some justice in the contention of Great Britain that equality of treatment is not being shown as long as the President has it in his power, whether he exercise the power or not, to fix tolls which might result in imposing an undue share of the upkeep of the canal upon foreign ships.

The CHAIRMAN. Is there any further discussion? Is there any desire to ask the speakers of the evening any questions? If not, I wish to make two announcements before declaring the meeting adjourned.

The banquet will be held in this room to-morrow evening at 7.30 o'clock. Procure your tickets from the Secretary this evening, in order that we may know how many will be present. To-morrow morning we are to have election of officers. It is the custom of the Society that a Committee on Nominations of five members be appointed for the purpose of recommending nominations. The Chair therefore appoints as such Committee of Five, to recommend nominations to fill vacancies for the ensuing year, Professor Woolsey as chairman, Professor Hershey, Admiral Merrell, Mr. Penfield, and Professor Wambaugh.

There being no further business to come before the Society this evening, we will now stand adjourned until ten o'clock to-morrow morning.

[Thereupon, at 9.45 o'clock p.m., the Society adjourned until to-morrow, Saturday, April 26, 1913, at 10 o'clock a.m.]